

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

**S.L., a minor, by and through her parent
And legal guardian D.L.,**

Plaintiff,

v.

**Honorable Gina M. Groh
Civil Action No. 3:18-CV-162**

**CITY HOSPITAL, INC., d/b/a BERKELEY
MEDICAL CENTER, a subsidiary of WEST
VIRGINIA UNIVERSITY HOSPITALS-EAST, INC.
d/b/a WV UNIVERSITY HEALTHCARE; BRANDT
WILLIAMSON, M.D.; MISTY HUNSADER PA-C;
SMOKY MOUNTAIN EMERGENCY SERVICES, INC.; and
HEALTH CARE ALLIANCE, INC.**

Defendants.

**DEFENDANTS' MISTY HUNSADER, PA-C, BRANDT WILLIAMSON, D.O.,
SMOKY MOUNTAIN EMERGENCY SERVICES, INC., AND HEALTH CARE
ALLIANCE, INC.'S RESPONSE TO PLAINTIFF'S MOTION TO FILE FOURTH
AMENDED COMPLAINT**

NOW COME Misty Hunsader, PA-C, Brandt Williamson, D.O., Smoky Mountain Emergency Services, Inc. and Health Care Alliance, Inc. ("Defendants"), by and through their counsel, and pursuant, to Rule 15(a)(2) of the Federal Rules of Civil Procedure, respectfully responds to Plaintiff's Motion to Amend the Complaint and in opposing the same, moves this Honorable Court to deny the Plaintiff's Motion to File Fourth Amended Complaint.

Argument

1. Plaintiff's motion to file a Fourth Amended Complaint against these Defendants must be denied because it is futile.

Rule 15(a)(2) of the Federal Rules of Civil Procedure allows a plaintiff to amend her complaint for the fourth time only when justice so requires where, as here, an opposing party objects to the proposed amended complaint. Fed. R. Civ. Proc. 15(a)(2).

Justice does not require nor allow for amendment when the proposed amended complaint is futile. *Laber v. Harvey*, 438 F.3d 404, 426–27 (4th Cir. 2006); *See Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir.1986) (citing 427 *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

A proposed amended complaint is futile if it could not survive a motion to dismiss. *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995); *In re Triangle Cap. Corp. Sec. Litig.*, 988 F.3d 743, 750 (4th Cir. 2021).

Here, this Court has already disposed of and dismissed Counts I, II, and part of IV against these defendants. Importantly, a proposed amendment to a complaint that restates and seeks to reinstate claims that have already been dismissed must be denied as futile. *Ross v. City of Waukegan*, 5 F.3d 1084, 1088 (7th Cir. 1993) (holding that proposed allegations to claims already dismissed by the district court are futile and precluded by use of an amended complaint.)

Plaintiff here admits on the face of the motion that her sought-after amendment is as to Berkeley Medical Center only. However, in descriptive language in the proposed amendment at paragraphs ¶¶ 107-8 plaintiff expressly invokes these defendants. Where a Plaintiff adds descriptive language to a proposed amended complaint to a claim that has been previously dismissed, the same must be dismissed absent a showing of error. *Cutonilli v. Maryland*, 251 F. Supp. 3d 920, 923 (D. Md.), *aff'd*, 696 F. App'x 648 (4th Cir. 2017). In *Cutonilli*, the court

dismissed two counts of the plaintiff's original complaint for failure to state a claim which relief could be granted. *Id.* at 922. The plaintiff proposed to amend the complaint to address the dismissal. *Id.* Because the proposed amended complaint merely tracked the original complaint's allegations, the court held that the proposed amended complaint was futile under Rule 15 (a) (2). *Id.* at 923. Plaintiff does not plead error as to this Court's prior rulings as to these defendants and as such, the sought-after amendment is futile and denial is proper.

Further, on the face of the proposed amendment, Plaintiff readily admits the Court has already ruled on the Motion to Dismiss the ADA claims against these Defendants. ¶10, Motion to File Fourth Amended Complaint. Further, Plaintiff admits the proposed Fourth Amended Complaint addresses BMC's pending Motion to dismiss the related ADA claims against it and has nothing to do with these defendants. *Id.* Collectively, for these reasons, the, Plaintiff's proposed fourth amended complaint would not survive a motion to dismiss by these defendants and is futile.

Moreover, Plaintiff adds no new allegations to the remaining Third Cause of Action against Defendants. Therefore, Plaintiff's Motion to File Fourth Amended Complaint is futile because nothing new is alleged against these Defendants. The Court has already granted the Motion to dismiss the related ADA causes of action against these Defendants. Plaintiff does not challenge the order dismissing these defendants in the proposed Fourth Amended Complaint. Like *Cutonilli*, where the court held that the proposed amended complaint was futile because it merely tracked the original complaint allegations that were already dismissed, here the result should be the same because Plaintiff merely alleges the claims that were already dismissed against these Defendants. Thus, the Court must deny Plaintiff's Motion to File Fourth Amended Complaint.

Conclusion

Even viewed under the liberal standard under Rule 15(a)(2), Plaintiff's Motion to File Fourth Amended Complaint is futile because it would not survive a motion to dismiss by these Defendants.

Wherefore, pursuant to the Federal Rules of Civil Procedure 15(a)(2), these Defendants move this Honorable Court to enter an Order denying Plaintiff's Motion to File Fourth Amended Complaint and for all other relief deemed fair and just.

Respectfully submitted,

**Brandt Williamson, M.D.; Misty Hunsader, PA-C;
Smoky Mountain Emergency Services, Inc.; and
Health Care Alliance, Inc.,**

By Counsel,

/s/ Tamela J. White

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Defendants.

CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that on this 1st day of April, 2021, I filed the foregoing *DEFENDANTS' MISTY HUNSADER, PA-C, BRANDT WILLIAMSON, D.O., SMOKY MOUNTAIN EMERGENCY SERVICES, INC., AND HEALTH CARE ALLIANCE, INC.'S RESPONSE TO PLAINTIFF'S MOTION TO FILE FOURTH AMENDED COMPLAINT* with the Clerk of the Court using the ECF filing system, which will send notification of such filing to the following counsel of record:

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